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TO LOBBY OR NOT TO LOBBY: THAT IS AN IMPORTANT QUESTION

Kermit V. Lipez*

As part of the nomination process to be a federal judge, I went to Washington in 1997 for a so-called White House interview (which actually takes place in the Eisenhower Executive Office Building) with lawyers from the President's Office of Legal Counsel and the Justice Department. I was then a member of the Maine Supreme Judicial Court.[1] Evaluating how I worked with my colleagues on the court, one of the lawyers asked if I believed in lobbying them to win support for my views. Without hesitation I said that I did not. I had never lobbied my colleagues and they did not lobby each other.

Of course, we were not discussing lobbying that involved asking for a favor or promising a return favor in a future case. That kind of lobbying is improper. Rather, the lobbying at issue would be on the merits—one-on-one conversations, face to face or by telephone (the court had no email at that time)—with the objective of persuading a colleague to agree with my view of the case. I explained that I did not believe in such lobbying because, inevitably, the effort becomes personal, with an undesirable pressure on both sides of the exchange. The judge who lobbies wants to prevail. The judge being lobbied may feel an impulse to please. Also, I saw lobbying as divisive, creating factions on a court that valued cohesiveness. And so I told my interviewer that I had never done it.

My answer about lobbying reflected the culture of the Maine Supreme Court, where the seven justices dealt with the cases collectively, without side conversations between justices. We did not discuss cases before oral argument. Our post-

* Senior Judge, United States Court of Appeals for the First Circuit.

1. Formally, this is the proper title for Maine's highest court. For the sake of simplicity, I refer subsequently to the "Maine Supreme Court."

argument conferences were invariably formal. The pre-assigned justice[2] would speak first, declaring a position that was a recommendation to the other justices, who then voted in ascending order of seniority, with the Chief Justice voting last. The explanations for the votes were brief. We did not challenge or ask questions of each other, understanding that the decision of the conference was subject to change during the writing process and the review of the draft opinion by colleagues.

If we had a split vote during the conference, it was in full view of the court. If disagreements emerged in response to a circulated draft opinion, they played out openly through the circulation of comment memos shared with every member of the court. Although four of us had chambers in the Cumberland County Courthouse in Portland, the home of the Maine Supreme Court, and our other three colleagues were in courthouses in other parts of the state, the four of us in Portland scrupulously avoided discussing the cases apart from our colleagues. There were occasional jokes about the Portland cabal, but we all valued our sense of shared mission as a court too much to jeopardize it with side discussions of two or three. Expressing our disagreements in memos that everyone would see, we relied on the force of those memos to persuade our colleagues to join us. If they did not, we would dissent or recede, and move on to the next case.

I have now had a different experience on the United States Court of Appeals for the First Circuit, where I have served for over fifteen years. Inescapably, my answer to a question today about my belief in lobbying would reflect that experience. It is no longer a simple answer.

I. THE COURT OF APPEALS—THE PANELS

The federal Courts of Appeals do most of their work in panels of three judges. Only in the exceptional circumstance of en banc review,[3] which involves less than one percent of the

2. Cases were randomly assigned to the seven justices in advance of argument. Law clerks would prepare bench memos on the pre-assigned cases. Those memos were then shared with all of the justices.

3. En banc review means, at least in the smaller circuits, that the entire court of appeals reviews the decision of the trial court or the administrative agency, usually

cases in any given Court of Appeals,[4] do all of the active judges hear and decide a case. Thus, unlike the Maine Supreme Court, the Court of Appeals as a whole rarely works together on a case.[5] The action is on the panels, whose membership is always changing, and the norm there is for the three judges to work openly together to find common ground. Although dissents on my court are not rare, they are not done casually. Our initial effort is to achieve consensus, beginning with the discussions at the post-argument conference. Unlike the structured format of the conferences on the Maine Supreme Court, the First Circuit panel conferences follow no predictable pattern, varying in form with the judge who happens to be presiding that day.[6] Sometimes the presiding judge will speak first, and then invite comments from colleagues. Other times the presiding judge will invite colleagues to speak first.[7]

If differing views emerge during the conference, there is an opportunity to talk them through, not in great detail, but in enough detail to allow the writing judge[8] to understand the concerns that must be addressed if there is any hope of getting a unanimous decision. Also, the conference reveals degrees of conviction about a position—firm, leaning, undecided. If one colleague is already in firm disagreement with the other two, there is probably little gain in trying to draft an opinion that will meet those concerns. If the colleague is leaning or undecided, however, the writing judge will draft with that colleague's concerns in mind.

For the most part, the comment period that follows the circulation of an opinion on the Court of Appeals is like the comment period on the Maine Supreme Court. The non-writing

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following a decision by a panel of three judges that first heard the appeal. The vote to hear a case en banc means that the decision of the panel is withdrawn. It is then up to the en banc court to resolve the case.

4. Pauline T. Kim, *Deliberation and Strategy on the United States Court of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1368–69 (2009).

5. On the First Circuit, the smallest of the circuits, the court as a whole means the six active judges.

6. The Chief Judge, if a member of the panel, or the most senior active judge on the panel serves as the presiding judge.

7. There is often a tactical consideration in this choice. Speaking first gives you an opportunity to establish the terms of the discussion and perhaps persuade an undecided colleague.

8. The presiding judge makes the writing assignments at the conference.

judges on the panel state their concerns in memos shared with the entire panel. The writing judge will redraft with these concerns in mind and circulate a revised opinion. There will be another exchange of memos, and this process will continue until, ideally, the judges agree on a final draft, or, as sometimes happens, one judge decides to dissent.

There is an exception to this process, however, that signals a difference in culture between the Maine Supreme Court and the First Circuit. In response to a draft decision that has just been circulated, one member of the panel will ask the third member to defer responding to the draft until the member asking for time has an opportunity to circulate a response. Such a request usually reflects major concerns with the circulating opinion and a desire to shape the law of the case before the third member of the panel commits to a position. Sometimes this request is in the form of a memo shared with the writing judge. Sometimes the request is in the form of a phone call or email that excludes the writing judge.

This latter circumstance creates awkwardness. It feels rude to ignore the request of your colleague. It feels deceptive to keep the writing judge in the dark. Although there is no engagement yet on the merits of the case, and hence no lobbying in that sense, this willingness to exclude a colleague from a conversation about the case during the panel deliberations can become problematic during the en banc process.

II. THE COURT OF APPEALS—EN BANC

The en banc court is an artifact of division. Unlike a state supreme court, which usually operates as a collective body, the en banc court ordinarily assembles only when enough of its members have voted to withdraw a panel opinion and hear the case anew in front of all of the active judges on the court and any senior judge who may have been a member of the panel.[9] These are not the votes of judges on a higher court undoing the decision of a lower court. These are your own colleagues

9. On rare occasions, the judges on a court of appeals can agree to hear a case initially en banc, without the case first being heard by a panel of judges.

undoing your work.[10] There is no minimizing the unpleasantness of this phenomenon, which is why en banc review can be the most divisive event in the life of a court of appeals. And that is why the judges on the court should take particular care to minimize this divisiveness. Lobbying for or against en banc review can have the opposite effect.

That said, I did such lobbying once. The circumstance was unusual. I had written an important majority opinion with substantive and procedural components. There was a strong dissent. When the inevitable petition for en banc review arrived, I knew that my dissenting colleague would be lobbying for en banc review of the entire case. This lobbying would not take the form of a memo urging en banc review sent to all of the judges. It would involve phone calls to particular judges.

Despite my distaste for the practice, I decided to make phone calls of my own. Believing that what mattered most was preserving the substantive portion of the decision, I told my colleagues that, if the vote for en banc review was denied, the panel majority would be willing to issue a new opinion with only the substantive portion of the decision retained. Agreeing that this was a fair compromise, the colleagues whom I called committed to vote against en banc review. When my dissenting colleague made calls seeking to undo the entire decision, it was too late.

Afterward, I was glad that I had preserved the most critical part of an important decision, even though I had lost my lobbying purity. I realized that I would probably do it again if the stakes were high enough. That experience, however, did not change my view that routine lobbying during the en banc process, aimed at controlling the law of the court whenever possible, can impair the collegiality of a court.

III. LOBBYING AND COLLEGIALITY

Any critique of lobbying on an appellate court must acknowledge its most famous success. In *Brown v. Board of*

10. On the First Circuit, en banc review will take place if four of the six active judges vote for it. *See* Fed. R. App. P. 35(a) (requiring a majority vote); 1st Cir. R. 35(a)(1) (same).

Education,[11] Chief Justice Warren lobbied his colleagues one by one to get a unanimous vote:

> In his meetings Warren pressed for two results: a unanimous decision that would demonstrate that the court was unshakable; and a ruling unencumbered by concurring opinions that might dilute the legal authority upon which they were overturning *Plessy*.
>
> One by one the associate justices fell in behind the Chief. They agreed to hand down a decision declaring segregation unconstitutional, yet avoid immediate imposition of a simple rule for ending segregation.[12]

There are other well-documented examples of side conversations among Supreme Court justices on momentous cases. In 1992, during the post-argument consideration of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] a case that threatened to overturn *Roe v. Wade*,[14] Justice Kennedy met privately with Justices O'Connor and Souter to draft an opinion that would save the essence of *Roe*.[15] Nonetheless, Justice Kennedy frowns on such lobbying before argument:

> Before the case is heard, we have an unwritten rule. We don't talk about it with each other. [If the rule is violated], we send a memo to everybody about what we've talked about, because we don't want little cliques or cabals or little groups that lobby each other.[16]

Justice Kennedy's different attitudes toward pre- and post-argument lobbying on the Supreme Court suggest the complexity of the lobbying question. He recognizes that lobbying has the potential to create cliques and cabals on an appellate court, thereby threatening the collegiality that is so important to its effectiveness. But his behavior, and that of Chief Justice Warren, reflects the reality that the stakes in a case are sometimes so high that lobbying for an outcome may be justifiable.

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11. 347 U.S. 483 (1954).
12. Ed Cray, *Chief Justice: A Biography of Earl Warren* 283 (Simon & Schuster 1997).
13. 505 U.S. 833 (1992).
14. 410 U.S. 113 (1973).
15. *See* Linda Greenhouse, *Becoming Justice Blackmun* 204 (Times Books 2005).
16. Adam Liptak, *No Vote-Trading Here*, 159 N.Y. Times WK1 (May 16, 2010).

I accept the wisdom of these Supreme Court examples. Categorical judgments against lobbying on an appellate court are unwise. The subject does not lend itself to absolutes. There may be times when the outcome in a case will be so important that private conversations between judges about the case, to the exclusion of their colleagues, may be justifiable. But the force of these Supreme Court examples for the work of the Courts of Appeals should not be overstated. We are, after all, an intermediate court of appeals. In calculating the costs and benefits of lobbying on our courts, the negative impact of lobbying on the collegiality of the court will seldom be matched by the magnitude of the case.

The concept of collegiality is often invoked in the discussion of appellate courts. As my late colleague Frank Coffin wrote in one of his fine books, "'collegiality' descends from the Latin word *collegium*, meaning a body of colleagues or co-workers" engaged in a shared enterprise.[17] This shared enterprise, working as it should, affirms the premise of appellate courts—multiple judges working harmoniously together have a better chance of getting it right than a single judge working in isolation. These judges respect each other's positions, recognize their own fallibility, and are open to persuasion. Judge Harry Edwards has put it well. On a collegial court,

> judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result . . . are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.[18]

Lobbying threatens this collegiality in concrete ways. First, it may breed an us-against-them mentality on the court. Inescapably, judges form natural alliances over time with certain colleagues because of similar judicial philosophies and life experiences. There is nothing harmful to collegiality in this natural process, even when these alliances form during the en banc voting process. But lobbying can turn these natural

17. Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 213 (W.W. Norton 1994) (italics original).

18. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1645 (2003) (footnote omitted).

alliances into hostile camps, with conspiratorial conversations taking place within sub-groups of the court.

Second, there is the unflattering motive for lobbying—the belief that participating in an open contest for support of one's position will not suffice, and that one's colleagues will respond only to the personal pressure that lobbying always entails. That pressure breeds resentment over the outcome of the vote for en banc review. The lobbying process disserves everyone involved.

To be sure, as I have already suggested, en banc proceedings are inherently divisive. They are always marked by some tension. The judges from the original panel, or the majority of that panel, inevitably feel like they have been taken to the woodshed. There is a harder edge, however, to the en banc proceedings generated by lobbying. The questions from the bench during the oral argument, though formally directed at counsel, are often testy commentaries on the positions of colleagues on opposing sides of the en banc vote. The en banc conference following such argument has a particularly sullen quality. Sometimes the judges raise their voices, requiring the Chief Judge to restore order. And the original panel majority almost always ends up in the minority after the en banc vote.

The strong feelings displayed at the en banc conference persist after the circulation of a majority decision for the en banc court. The majority in the withdrawn panel opinion composes a dissent that pushes the limits of civil disagreement on the court. These sharp exchanges go on through multiple rounds, each side vying for the last word with increasing impatience. One can almost hear the annoyed muttering in chambers throughout the circuit. The process finally ends because it must. But the hard feelings linger.

IV. CONCLUSION

I have heard of appellate courts that approach dysfunction because of the clash of personality and ideology. Despite the divisive en bancs that I have described, my court is not remotely like that. We like and respect each other. We are open to the saving grace of appellate work—those next cases that force us to move beyond whatever unpleasantness attended the resolution of the last case. There is no time to dwell on the past. Also, even

with the natural affinity that some judges have for each others' views, we understand that there are no enduring alliances in appellate work. Every case poses the potential of an uncommon opponent or ally. Thus we know that irreparable breaches are unwise.

We also understand that our working life will be more enjoyable if we get along with each other. To overcome moments of tension, we rely on the forms of civility—the plaudits for a circulating opinion, the deferential tone of a memo expressing reservations about an opinion, the apologies for continuing doubt, the invocation of "respectfully" at the beginning of a dissent. We realize that acting nice even if we do not feel nice at the moment is a good habit for appellate judges seeking to preserve collegiality on their court.

Still, this happy picture of my court does not dispel my disquiet with lobbying during the en banc process. At the margins, in those en banc reviews achieved by lobbying, I worry that the resulting hard feelings may impair the conditions for principled agreement described by Judge Edwards. I believe too that losing an open contest on the request for en banc review, one conducted through memos shared with all of the judges involved in the process, would not cause the dismay that a loss preceded by lobbying engenders. Moments of disaffection matter even if they are redeemable. We would be more at ease with each other if there were less lobbying during the en banc process.

This is a subject that judges should talk about. Healthy institutions, like healthy individuals, must be self-aware and willing to explore difficult subjects that affect their well-being. Lobbying is such a subject. It does not lend itself to written rules of conduct ("There shall be no lobbying") or absolute judgments ("Lobbying is never justified"). It involves prerogatives of conduct that judges hold dear. It is, however, a source of discontent that might be alleviated by an open discussion of the necessity for the practice and its costs. There is nothing to lose by such openness and perhaps much to gain. It is worth a try.